

The Honorable Barry J. Hobbins, Chair
Right to Know Advisory Committee
3 State House Station
Augusta, ME 04333

October 27, 2008

**Re: Confidentiality Issue Concerning Certain Records and Proceedings
of the Commission to Protect the Lives and Health of Members of the
Maine National Guard**

Dear Senator Hobbins:

I am writing to you on behalf of the **Commission to Protect the Lives and Health of Members of the Maine National Guard**. As part of our work, we have established a case review process in order to provide a vehicle to more closely examine noncombat deaths and disabilities amongst our Guard members and to provide a place for disabled veterans and grieving families to bring their questions and concerns in a less public setting than our Public Hearings.

I have attached a copy of the draft Case Review Process, as well as our authorizing legislation, for your review. Because our statute does not make records or proceedings relating to personal medical information confidential, we are concerned we will be unable to effectively carry out responsibilities that require review of such information without jeopardizing the legitimate privacy interests of our National Guardsmen, women and their families.

We request that your Advisory Committee review this issue at your November meeting and consider recommending an appropriate statutory change that we might submit prior to the cloture date for the next Legislative Session and any other guidance so that veterans and their families privacy interests might be protected.

The Attorney General's office has offered some guidance to us as to how an individual's medical records may be protected under some circumstances. Such as, the definition of "public records" in the Freedom of Access Law contains exceptions for records made confidential by statute, as well as those within the scope of a privilege against discovery or use as evidence, under 1 M.R.S.A. §402(3)(A)&(B). The privilege for communications between

social workers and their clients under 32 M.R.S.A. § 7005 is an example of a statutory confidentiality provision. However, it is insufficient protection for the records and proceedings we expect to conduct because it is limited to information acquired while providing social services, and thus would not cover the individual's subsequent discussion with our Commission of his or her treatment, course of recovery, side effects, etc. Another example is the statute governing the confidentiality of health care information found at 22 MRSA §1711-C. This statute provides excellent direction for the protection of health care records in the possession of health care providers, but is of limited use in the situation where a veteran provides testimony or records regarding their health care to the Commission.

The Physician and Psychotherapist-Patient Privilege in Rule 503 of the Maine Rules of Evidence is similarly limited to "communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition" and thus affords insufficient privacy protection to those who appear before the Commission. In addition, as these two provisions illustrate, existing protections, whether in statute or privileges recognized by the courts, are typically specific to particular types of a variety of health care personnel who may have provided services to Guard personnel, and would require us to apply a number of different statutes or privileges in determining what part of an individual's treatment information is confidential. Moreover, the availability of an executive session for discussion of such sensitive material is limited to "[d]iscussions of information contained in records made, maintained or received by a body or agency when access by the general public to those records is prohibited by statute..." 1 M.R.S.A. § 4056(F). As a result, the shortcomings of the protections afforded by statute and privilege also affect the Commission's ability to engage in discussions of sensitive information in an appropriate setting.

Members of the Commission to Protect the Lives and Health of Members of the Maine National Guard and I would be happy to meet with you to discuss this. Thank you for your consideration of our concerns.

Sincerely,



Barbara A. Damon-Day, Chair

207 586-5003/acorn444@yahoo.com

Appendix 5: Public Law, Chapter 318, 123rd Maine State Legislature, An Act To Protect the Lives and Health of Members of the Maine National Guard

PLEASE NOTE: The Office of the Revisor of Statutes *cannot* perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

Public Law
123rd Legislature
First Regular Session
Chapter 318
H.P. 1321 - L.D. 1889

An Act To Protect the Lives and Health of Members of the Maine National Guard

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, members of the Maine National Guard are being sent into military conflicts throughout the world; and

Whereas, the health and lives of Maine National Guard members are at constant risk; and

Whereas, it is essential to reduce these risks as soon as possible; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §12004-G, sub-§26-F is enacted to read:

26-F.

<u>Maine</u>	<u>Commission to Protect the Lives</u>	<u>Legislative Per</u>	<u>37-B</u>
<u>National</u>	<u>and Health of Members of the</u>	<u>Diem and</u>	<u>MRSA</u>
<u>Guard</u>	<u>Maine National Guard</u>	<u>Expenses</u>	<u>§532</u>

Sec. 2. 22 MRSA §255-A is enacted to read:

§ 255-A. Commission to Protect the Lives and Health of Members of the Maine National Guard

The commissioner, through the Director of the Maine Center for Disease Control and

Prevention, shall provide for assistance to the Commission to Protect the Lives and Health of Members of the Maine National Guard in order for the commission to achieve the purpose for which it is created in Title 37-B, chapter 8-A. The Director of the Maine Center for Disease Control and Prevention and the Commissioner of Defense, Veterans and Emergency Management shall coordinate their resources, including staff assistance, to the commission and cooperate under the direction of the commission to provide a higher standard of preventative health care for members of the Maine National Guard.

Sec. 3. 37-B MRSA c. 8-A is enacted to read:

CHAPTER 8-A

Commission to Protect the Lives and Health of Members of the Maine National Guard

§ 531. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Center for disease control. “Center for disease control” means the Department of Health and Human Services, Maine Center for Disease Control and Prevention.

2. Commission. “Commission” means the Commission to Protect the Lives and Health of Members of the Maine National Guard established in section 532.

3. Maine National Guard. “Maine National Guard” includes the Maine Army National Guard and the Maine Air National Guard.

§ 532. Commission to Protect the Lives and Health of Members of the Maine National Guard; established

The Commission to Protect the Lives and Health of Members of the Maine National Guard is established.

1. Composition of commission. The commission consists of:

A. The Adjutant General, who serves ex officio;

B. The director of the center for disease control, who serves ex officio;

C. The Director of the Bureau of Maine Veterans’ Services, who serves ex officio;

D. A physician licensed in the State with experience and knowledge of preventive care, appointed by the President of the Senate from a list provided by the Maine Medical Association or its successor organization;

E. A pharmacist licensed in the State, appointed by the Speaker of the House;

F. A retired Maine veteran who has served in a war zone, appointed by the Speaker of the

House;

G. A family member of a deceased military person from the State who died from a noncombat cause while serving in a military capacity, appointed by the Governor;

H. A disabled Maine military person with a major noncombat disability suffered while serving in a military capacity, appointed by the President of the Senate; and

I. A psychologist licensed in the State, appointed by the Governor.

2. Advisory members. The Chief Medical Examiner within the Attorney General's office shall serve as a nonvoting advisory member. The Director of the Department of Veterans Affairs Medical at Togus Hospital or the director's designee may serve as a nonvoting advisory member.

3. Terms. Each commission member must be appointed to a 3-year term, except ex officio members, except that the terms of the initial members are staggered as follows.

A. The initial appointments made by the President of the Senate are for 3 years. The initial appointment of the retired veteran made by the Speaker of the House pursuant to subsection 1, paragraph F is for 2 years. The initial appointment of the family member of a deceased military person who died from a noncombat cause pursuant to subsection 1, paragraph G is for 2 years. The initial appointments of the psychologist and the pharmacist are for one year. All appointments after the initial appointments are for 3 years.

B. Ex officio members shall serve on the commission as long as they hold their offices. Other members serve until their replacements have been appointed. Members may be reappointed following the expirations of their terms.

4. Chair. The Governor shall appoint the chair of the commission from among its membership, who may not be an ex officio member of the commission.

5. Compensation. Members of the commission, except ex officio members, are paid a per diem and compensated for expenses at the same rates provided to Legislators under Title 5, chapter 379.

§ 533. Responsibilities of the commission

1. Responsibilities. The commission, with assistance from the department and the center for disease control, shall:

A. Review all the preventive health care treatment practices and protocols, including, but not limited to, physical and emotional screenings, vaccinations, electrocardiograms and physical examinations as they apply to members of the Maine National Guard in different age groups;

B. Review the vaccinations and other medications currently provided to members of the Maine National Guard, particularly those that produce allergic reactions and dangerous side effects, and compare the vaccinations and medications with those recommended by the National Institutes of Health, the United States Food and Drug Administration and other sources of standards of medical care;

C. Propose recommendations and seek approval from the Armed Forces of the United States for safer health care practices and protocols to be administered to members of the Maine National Guard;

D. Propose and seek approval from the Armed Forces of the United States for the Maine National Guard to retain a copy of the medical records of each member of the Maine National Guard who is sent to active duty;

E. Provide for the education of members of the Maine National Guard and other military personnel, especially medical staff, with respect to safer and more effective health care practices and protocols;

F. Assist the families of Maine National Guard members who died in military service from noncombat causes, including suicide, to obtain accurate and timely information in regard to the deaths of the Maine National Guard members;

G. Provide for the cooperation and coordination of assistance between the Maine National Guard and the center for disease control with respect to this chapter;

H. Work with the Bureau of Maine Veterans' Services to track the care of the physically and psychologically wounded Maine National Guard and Armed Forces service members from Maine within the health care systems of the United States Department of Defense and the United States Department of Veterans Affairs and serve as an advocate to ensure a high quality of care; and

I. Assist the Maine National Guard in ensuring appropriate demobilization procedures and follow-up for Maine National Guard members related to mental health issues, including, but not limited to, substance abuse and post-traumatic stress disorder.

2. Commission reports and recommendations. The commission shall report its findings and recommendations, including any necessary legislation, to the Governor and the joint standing committees of the Legislature having jurisdiction over legal and veterans affairs and health and human services matters.

A. The commission shall prepare a preliminary report for the Governor and Legislature regarding its efforts under this section by April 1, 2008.

B. The commission shall issue a complete report regarding its efforts under this section by

December 15, 2008 and annually by December 15th thereafter.

§ 534. Meetings of the commission; public hearing

The commission shall meet at least 4 times a year, including at least one public hearing a year at which Maine National Guard members and their families, former Maine National Guard members and their families and members of the public may testify and present concerns and recommendations for the commission to consider.

§ 535. Assistance from state agencies

The Commissioner of Defense, Veterans and Emergency Management and the Commissioner of Health and Human Services through the center for disease control shall coordinate their resources and provide assistance, including staff assistance, research, reports and other assistance, to the commission in order to provide a higher standard of preventive care to members of the Maine National Guard.

Sec. 4. Purpose. The intent of this Act is to provide higher and safer standards for preventative medical practices and health screenings administered to members of the Maine National Guard than currently exist and to encourage the federal military forces to adopt these higher standards. It is also the intent of this Act to prevent future noncombat deaths and injuries of military personnel by creating the Commission to Protect the Lives and Health of Members of the Maine National Guard and by directing the Maine National Guard and the Maine Center for Disease Control and Prevention to take such action as necessary to accomplish this purpose including coordination and cooperation between these 2 agencies.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

Effective June 18, 2007.

DRAFT

Case Review Process For The Commission to Protect the Lives and Health of Members of the Maine National Guard

What is the Noncombat Death and Disability Case Review Board?

The Noncombat Death and Disability Case Review Board has been established to prevent future noncombat death and disability in the Maine Army National Guard, in a no-fault manner.

What is the role of the Noncombat Death and Disability Case Review Board (NDDCRB)?

The NDDCRB will listen to concerns and questions of family members or veterans who have suffered a noncombat death or disability. The NDDCRB will assist and advocate for the veteran or family in getting questions answered, actions taken, and problems resolved.

The NDDCRB will make recommendations for changes to the Commission to Protect the Lives and Health of Members of the Maine National Guard.

Who sits on the NDDCRB?

The NDDCRB will be multi-disciplinary, made up of 3 – 5 members with expertise or experiences best suited to listening compassionately and addressing the needs of the family or veteran, to be selected by the Chair.

The Chair of the Commission will chair or appoint a chair for the Board.

How does the NDDCRB ensure that recommendations are carried out?

The NDDCRB shall prepare and provide a report of the case review to the Commission and family or veteran within 3 months of the final session.

The Commission has the responsibility to see that recommended changes are made, if a state issue, or that recommendations for action be moved forward, if a federal issue or otherwise beyond the Commission's jurisdiction.